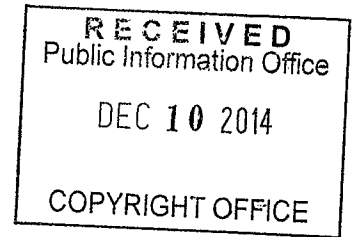


Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.



In the Matter of

DETERMINATION OF ROYALTY RATES
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)

Docket No. 14-CRB-0001-WR

(2016-2010)

Received

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Copyright Royalty Board

**iHEARTMEDIA'S OPPOSITION TO SOUNDEXCHANGE'S MOTION TO
COMPEL iHEARTMEDIA TO PRODUCE DOCUMENTS RELATED
TO THE TESTIMONY OF DAVID PAKMAN**

SoundExchange's Motion To Compel iHeartMedia to Produce Documents Related to the Testimony of David Pakman (the "Motion") should be denied because Mr. Pakman's employer, Venrock, is a non-participant, and iHeartMedia does not exercise control over Venrock. Compelling documents from Venrock would require the Judges to issue a subpoena, which SoundExchange has not sought and could not obtain because it does not meet the heightened standard for obtaining a subpoena. Moreover, compelling non-participant Venrock to produce documents would impose a heavy and intrusive burden on Venrock, thereby creating a troubling precedent that could discourage experts from offering testimony in rate-setting proceedings.

The Motion also should be denied because the documents that SoundExchange seeks are not directly related to Mr. Pakman's written direct testimony. And any conceivable relevance of the documents is far outweighed by the burden that would be imposed on Venrock and Mr. Pakman's colleagues.

BACKGROUND

Mr. Pakman submitted written direct testimony in this proceeding as an expert witness, based on his 14 years of experience as an investor and entrepreneur in the digital music industry. *See* Pakman WDT ¶¶ 1-11. Although he happens to be currently employed at Venrock, and although his conclusions were based in part on “[his] evaluation of potential investments while at Venrock,” *id.* ¶ 11, Mr. Pakman’s observations and conclusions were his alone, and he did not purport to testify on behalf of Venrock or any other entity. *See, e.g., id.* ¶ 26 (“From my personal experience, investing in digital music companies is largely disfavored in the venture funding community”); *id.* ¶ 29 (“As a venture capitalist, I do not find webcasting companies operating under the Copyright Royalty Board (“CRB”) rates to be attractive candidates for investment, particularly when weighed against the many other healthy internet sections.”).

Based on his personal experience, Mr. Pakman testified that “th[e] [digital music] industry has fared poorly due primarily to royalty rates that are too high.” *Id.* ¶ 11. The gravamen of his testimony, based on his long experience in the music industry, is that digital music services generally produce lower returns on investment and fail more often than firms in other Internet and technology sectors due primarily to excessively high royalty rates; such services, on the whole, currently are not attractive investments for venture capital because of these royalty-rate-driven economic results. *See id.* ¶¶ 19–34. In addition to his personal experience, Mr. Pakman referenced or relied upon many documents to formulate his conclusions, all of which were produced to SoundExchange as part of iHeartMedia’s initial disclosures, along with his research into venture capital databases, which also have been made available to SoundExchange.

In one section of Mr. Pakman's testimony, he describes some of Venrock's investments in Internet ventures *outside* the digital music industry and his understanding that "Venrock has never invested in any digital music or internet radio companies." This section also relates Mr. Pakman's understanding, again based upon his personal knowledge, that "[t]he overwhelming majority of [his] venture capital colleagues have taken a similar approach by declining to invest in such services." *Id.* ¶¶ 12–15. In a completely separate section of his testimony, which makes no reference to Venrock investments whatsoever, Mr. Pakman attributes the general lack of investment in digital music to high royalty rates, noting that "many investors are unwilling to fund new music streaming companies." *See id.* ¶¶ 29–34.¹ In context, Mr. Pakman was making the point that, based on the track record of investment in the digital music sector, investors generally appear unwilling to invest in the current environment. But Mr. Pakman plainly did not purport to testify about specific investment decisions by Venrock or any other particular firm. It is equally clear that Mr. Pakman offers no testimony about the *reasons* for any of Venrock's investment decisions. Rather, he observed a general absence of investment activity and offered his individual, expert opinion about the economic factors contributing to that trend.

During discovery, SoundExchange broadly requested from iHeartMedia "[a]ll documents that concern or relate to any investment proposed or considered by Venrock in any business incorporating digital music, including all documents relating to the reasons Venrock either invested or did not invest in that business."² In response to this request, iHeartMedia produced Mr. Pakman's notes concerning digital music investment opportunities that he has considered since 2011, even though he had not relied upon them in preparing his testimony. iHeartMedia

¹ The heading of Part III also states that Venrock "and other investors are unwilling to invest in digital music services." Pakman WDT at 4.

² SoundExchange's First Set of Requests for Production of Documents to iHeartMedia No. 29 (attached as Ex. A to Declaration of Kuruvilla J. Olasa ("Olasa Decl.") dated Dec. 3, 2014).

objected to producing other Venrock documents on several grounds, including that such documents are neither directly related to iHeartMedia's written direct statement nor within iHeartMedia's possession or control and that to require a search for such documents would be unduly burdensome.³ During the meet-and-confer process, counsel for iHeartMedia reiterated and elaborated upon these grounds for not producing other Venrock documents and also advised SoundExchange that it could evaluate Venrock's specific investments through other sources, such as "the PitchBook database" and "the publicly available listing of Venrock's current and alumni investments . . . on its website."⁴ Despite this reasonable compromise proposal, SoundExchange filed the instant motion to compel.

ARGUMENT

A. THE JUDGES SHOULD DENY THE MOTION BECAUSE IT IMPROPERLY SEEKS DOCUMENTS FROM A NON-PARTICIPANT

Both the statute and the Judges' regulations authorize document requests only "of an opposing participant." 17 U.S.C. § 803(b)(6)(C)(v); 37 C.F.R. § 351.5(b)(1). The rules thus draw a distinction between participants like iHeartMedia and *non-participants* like Mr. Pakman's employer, Venrock.⁵ The rules at one time permitted a participant to "request of an opposing participant *or witness* other relevant information and materials" under certain circumstances,

³ iHeartMedia's Amended Responses and Objections to SoundExchange's First Set of Requests for Production of Documents No. 29 (attached as Ex. B to the Olasa Decl.); *see also id.* at 2–3 (objecting generally to requests not directly related to iHeartMedia's written direct statement and incorporating that objection into each specific response).

⁴ E-mail from Kevin Miller to Kuruville Olasa (Nov. 18, 2014) (attached as Ex. A).

⁵ Memorandum Opinion on Material Questions of Substantive Law, at 2 n.3 Docket No. 2009-1, CRB Webcasting III (Feb. 22, 2010) ("*Register of Copyrights Opinion*") (noting that "a 'participant' is a party to the proceeding").

37 C.F.R. § 351.5(c)(1) (emphasis added),⁶ but this rule is no longer in force, *see id.* This should be the end of the matter.⁷

SoundExchange concedes that it seeks documents beyond iHeartMedia's possession or control, but asserts that this is of no consequence. *See* Mot. at 4–5. SoundExchange argues that documents can be sought of a non-participant, citing a 2007 order that required discovery of a fact witness. But this order is inapposite.⁸ First, it relied upon the now-expired provision permitting participants to request information directly from a *witness*, a change of law that SoundExchange ignores completely in its motion. Second, unlike the situation here, the witness at issue in the 2007 order, Simon Renshaw, was a *fact* witness for SoundExchange and his testimony related directly to the actions he had taken on behalf of his company.⁹ In contrast, Mr. Pakman is an expert witness, whose testimony is based on his extensive industry expertise and is largely divorced from Mr. Pakman's activities at Venrock and Venrock's activities more generally.

⁶ The Copyright Act contains a substantially identical provision. *See* 17 U.S.C. § 803(b)(6)(C)(vi)(I). Both provisions expired on December 31, 2010, and are therefore unavailable in the present proceeding.

⁷ Even under the old rule, SoundExchange would be limited to obtaining documents in Mr. Pakman's personal possession, not Venrock's possession, unless SoundExchange were able to show, at a minimum, that Mr. Pakman somehow controlled Venrock. SoundExchange has not made such a showing here. SoundExchange claims (Mot. at 4–5) that Mr. Pakman “can undoubtedly obtain the requested documents because, as a partner at Venrock, he has the ‘practical ability to obtain’ the documents,” and that “[i]f he has no such practical ability, then he would not have been able to make the sweeping statements about Venrock that his expert testimony contains.” This argument fails. First, the mere fact that Mr. Pakman is one of several partners at Venrock hardly establishes that he can require the entire firm to produce documents. The one case that SoundExchange cites — *Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143, 147 (S.D.N.Y. 2011) — is not to the contrary, but instead holds that, for purposes of a subpoena (which, as discussed below, SoundExchange has not sought here), “[t]he burden of demonstrating that the party from whom discovery is sought has the practical ability to obtain the documents at issue lies with the party seeking discovery.” Second, Mr. Pakman never reviewed Venrock documents in developing his testimony, so it is non sequitur to claim that such documents were somehow necessary to such testimony.

⁸ *See* Mot. at 4 (citing Order Granting Motion To Compel SoundExchange To Provide Information and Documents Concerning the Written Direct Testimony of Simon Renshaw, Docket No. 2006-1 CRB DSTRA (May 17, 2007) (“*Renshaw Order*”)); Motion To Compel SoundExchange To Provide Information and Documents Concerning the Written Direct Testimony of Simon Renshaw, Submitted by Sirius Satellite Radio Inc., XM Satellite Radio Inc. and Music Choice at 3, Docket No. 2006-1 CRB DSTRA (Apr. 27, 2007) (relying on the then-effective 37 C.F.R. § 351.5(c)(1)) (“*2007 Motion To Compel*”) (attached as Ex. B).

⁹ *See* Introductory Memorandum to the Written Direct Statement of SoundExchange, Inc. at 13, Docket No. 2006-1 CRB DSTRA (Oct. 30, 2006) (listing Mr. Renshaw as a fact witness).

In previous proceedings, SoundExchange itself has recognized that it is improper to obtain discovery from non-participants through the mechanism that it seeks to invoke here, and that the only permissible way to obtain documents from a non-participant is through a subpoena. In *Webcasting III*, SoundExchange stated that “there are times when some of the witnesses aren’t even under the control of a participant, and so you would have to issue a subpoena.”¹⁰ But SoundExchange has not requested that the Judges issue a subpoena. This is hardly surprising, because SoundExchange plainly could not meet the heightened standard for obtaining a subpoena against Venrock. *See* 17 U.S.C. § 803(b)(6)(C)(ix) (authorizing Judges to issue a subpoena “if the [Judges’] resolution of the proceeding would be substantially impaired by the absence of such . . . production of documents”).¹¹ SoundExchange’s concession not only undermines the basis for its Motion, but also underscores why it is improper to order a participant to produce documents (or testimony) from those that “aren’t even under the control of a participant.” When a discovery demand extends beyond a participant’s possession or control, a subpoena is required. This is the common-sense rule that applies in federal litigation discovery, *compare* FED. R. CIV. P. 34, *with* FED. R. CIV. P. 45,¹² and it is the rule Congress applied to discovery in royalty rate-setting proceedings, *see* 17 U.S.C. § 803(b)(6)(C).

SoundExchange’s motion exemplifies why a higher standard applies when a participant seeks discovery from a non-participant. The discovery SoundExchange seeks from non-participant Venrock would discourage qualified experts from offering their opinions in future

¹⁰ *Register of Copyrights Opinion* at 4 n.8 (emphasis added) (quoting Transcript of January 12, 2010, Hearing regarding motion to issue subpoenas).

¹¹ *See also* Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters, at 4, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 3, 2014) (documents sought in proposed subpoena “must be central to the resolution of the proceeding”).

¹² *See also, e.g., Hasbro, Inc. v. Serafino*, 168 F.R.D. 99, 100 (D. Mass. 1996) (“Rule 45, to the extent it concerns discovery, is . . . directed at non-parties and . . . Rule 34 governs the discovery of documents in the possession or control of the parties themselves.”).

rate-setting proceedings because they would understandably want to avoid entangling their colleagues and firms in burdensome and intrusive discovery requests. Granting SoundExchange's Motion would create a precedent that presents prospective expert witnesses with a lose-lose proposition: either refrain from referencing or relying on your personal experience in your field of expertise or risk subjecting your firm and colleagues to routine discovery demands from other participants. That result would diminish the quality of expert testimony available to the Judges and would thereby unduly restrict the universe of opinions the Judges could consider in setting royalty rates.¹³

Finally, even assuming it were proper to order a participant to produce documents exclusively in the possession of a non-participant, discovery into Venrock's internal and confidential communications and the deliberations of Mr. Pakman's colleagues about investment philosophies and opportunities would infringe upon extremely sensitive materials and trade secrets, and would impose an unreasonable burden on non-participant Venrock. Venrock is a small firm with fewer than 50 employees, and iHeartMedia understands that Venrock does not have the in-house capabilities to search for and review the documents that SoundExchange seeks. Therefore, Venrock would not only be required to disclose highly sensitive communications and other documents, but it would also be required to take on the expense of hiring an outside company to comply with SoundExchange's request. The magnitude of the burden that SoundExchange's request would impose and the perverse incentives it would create are further reason to deny the Motion.

¹³ SoundExchange has relied on a similar rationale to decline to produce documents in this proceeding. *See* E-mail from Rose Ehler to Todd Larson (Nov. 26, 2014) (attached as Ex. C) (contending "extensive discovery burdens would discourage . . . independent labels from agreeing to participate in the CRB proceedings").

B. EVEN IF THE STANDARDS FOR PARTICIPANT DISCOVERY APPLIED, THE JUDGES SHOULD DENY THE MOTION BECAUSE IT SEEKS DOCUMENTS THAT ARE NOT DIRECTLY RELATED TO iHEARTMEDIA'S WRITTEN DIRECT STATEMENT

The Judges' regulations allow participants to request of an opposing participant only "nonprivileged documents that are directly related to" the responding participant's written direct statement. 37 C.F.R. § 351.5(b)(1); *accord* 17 U.S.C. § 803(b)(6)(C)(v). The documents that SoundExchange seeks through this Motion do not meet that standard. SoundExchange claims that Mr. Pakman made "specific factual assertions" about "Venrock's decision to not invest in digital music services and the reasons for these decisions." Mot. at 4. But even a cursory review of Mr. Pakman's testimony demonstrates that this is not a fair characterization. He never testified about Venrock's specific investment opportunities or decisions, nor did he testify about Venrock's reasons for investing or not investing in any venture. His principal statement connecting Venrock to digital music was the observation, based solely on his personal knowledge, that "Venrock has never invested in any digital music or internet radio companies." Pakman WDT ¶ 15.¹⁴

Mr. Pakman also opined that "Venrock . . . and other investors are unwilling to invest in digital music services" and that "many investors are unwilling to fund new music streaming companies." Pakman WDT ¶¶ 4, 18. But these statements refer to Venrock only in the context of describing the actions of investors generally, and therefore do not provide a basis for demanding discovery of Venrock (or any other investors other than Mr. Pakman). Indeed, SoundExchange can point to no portion of Mr. Pakman's testimony where he says anything about Venrock's evaluation of potential investments in digital music ventures, let alone the

¹⁴ Notably, SoundExchange does not contest the accuracy of this statement or claim that it seeks the documents at issue in this Motion to test that statement.

reasons why *Venrock* may have invested or not invested in such hypothetical ventures. To the contrary, Mr. Pakman refers only to his own personal evaluation of investment opportunities throughout his testimony.¹⁵ He has not and will not testify regarding any specific investments proposed to, or evaluated by, *Venrock*, let alone the reasons why *Venrock* in particular has not invested in digital music. Thus, SoundExchange's assertions that the documents it seeks will be crucial to "test or rebut Mr. Pakman's assertions," Mot. at 4, is contrary to fact.

Further, SoundExchange's contrived rationales for how the requested discovery *might* help its case, *see* Mot. at 4, merely highlight the gap between the requested documents and Mr. Pakman's actual testimony. SoundExchange hypothesizes that "*Venrock's* documents could undermine [Mr. Pakman's testimony] by showing that *Venrock* is, in fact, willing to invest in digital music services but simply has not found the right opportunity." *Id.* But contrary to what SoundExchange suggests, when Mr. Pakman testified that investors were unwilling to invest in digital music services, he obviously did not mean that there was no circumstance in which such investment could occur.¹⁶ There is accordingly no basis to permit SoundExchange to somehow prove the negative that *Venrock* would invest if only the "right opportunity" came along in the future. *See id.* Even if such documents existed, therefore, they would not "test or rebut Mr. Pakman's assertions," *id.*, because Mr. Pakman nowhere asserts that *Venrock* or any other venture capitalist would refuse to invest in "the right opportunity." In short, the documents

¹⁵ *See* Pakman WDT ¶ 11 (basing conclusions on "*my* evaluation of potential investments" (emphasis added)); *id.* ¶ 18 ("based on *my* experience . . . as a venture capitalist evaluating potential investments in digital music companies (emphasis added)); *id.* ¶ 26 ("From *my personal experience*, investing in digital music companies is largely disfavored in the venture funding community" (emphasis added)); *id.* ¶ 29 ("As a venture capitalist, *I* do not find webcasting companies operating under the [CRB] rates to be attractive candidates for investment." (emphasis added)).

¹⁶ *See, e.g.*, Pakman WDT ¶ 29 ("Investment capital is attracted to markets where the possibility of high returns exist when weighed against potential risks. The pattern of near-certain failure irrespective of the amount of investment or the scale of the operator scares future investors away from the digital music sector.").

SoundExchange seeks are not directly related to Mr. Pakman's testimony, and iHeartMedia should not be required to produce them.

Finally, as set forth above (*supra* at pp. 6–7), any conceivable relevance these materials might have is far outweighed by the substantial burden that would be imposed by intrusive and distracting discovery into non-participant Venrock's confidential files and deliberations.¹⁷

* * *

In sum, discovery into Venrock's internal and confidential communications and the deliberations of Mr. Pakman's colleagues about investment philosophies and opportunities would infringe upon extremely sensitive materials and trade secrets, and would impose an unreasonable burden on non-participant Venrock. By contrast, SoundExchange seeks broad discovery of a non-participant based solely on a few references to Venrock's investments in Mr. Pakman's written direct testimony that primarily offer background and context to Mr. Pakman's conclusions and opinions. Therefore, even if the Judges were to conclude both that SoundExchange can seek documents from a non-participant without a subpoena and, moreover, that there is a direct relation between Mr. Pakman's testimony and the Venrock documents, the more appropriate remedy would be to excise the minor, isolated references to Venrock's investments from Mr. Pakman's testimony, rather than to order burdensome, intrusive discovery from Mr. Pakman's non-participant Venrock colleagues. *See Register of Copyright Opinion* at 7 (“The participants can comply with the order or, should it or its witnesses fail to do so, the CRJs can strike the affected portion of the participants testimony.”); *cf. ASUS Computers Int’l v. Round Rock Research, LLC*, No. 12-CV-02099, 2014 WL 1463609, at *10 (N.D. Cal. Apr. 11,

¹⁷ *See, e.g.,* Order Granting in Part and Denying in Part SoundExchange's Motion To Compel Sirius and XM To Produce Certain Content Deals, Negotiating Documents, and Internal Analyses of Content Deals, at 3, Docket No. 2006-1 CRB DSTRA (May 18, 2007) (granting request where “documents are directly related to testimony” and not “overly burdensome” but denying request that is “overbroad and burdensome”).

2014) (striking portions of expert report that relied upon documents not produced during discovery). Those few references are the entire basis for SoundExchange's document request and pending Motion, and removing them would render the document request irrelevant and moot the Motion.¹⁸

CONCLUSION

For the foregoing reasons, the Judges should deny SoundExchange's Motion To Compel iHeartMedia To Produce Documents Related to the Testimony of David Pakman.

Dated: December 10, 2014

Respectfully submitted,

iHEARTMEDIA, INC.



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¹⁸ Under this approach, iHeartMedia and SoundExchange could seek agreement on appropriate redactions to Mr. Pakman's testimony, and absent agreement there could be short supplemental briefing on this issue.

CERTIFICATE OF SERVICE

I, Evan T. Leo, hereby certify that a copy of the foregoing Opposition to SoundExchange's Motion To Compel iHeartMedia to Produce Documents Related to the Testimony of David Pakman has been served on this 10th day of December 2014 on the following persons:

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Exhibit A

From: Miller, Kevin J.
Sent: Tuesday, November 18, 2014 8:20 PM
To: 'Olasa, Kuruvilla'; LeMoine, Melinda; Ehler, Rose
Cc: 'Ablin, Karyn'; Lyons, Gregory; Joseph, Bruce; Leo, Evan T.
Subject: RE: Meet and Confer

Dear Counsel:

I am writing in response to the November 14, 2014 letter from Kuruvilla Olasa to Mark Hansen regarding documents requested from David Pakman and as a follow-up to our meet and confer today concerning those issues.

First, as it concerns your Request No. 25 related to the PitchBook Platform relied upon by Mr. Pakman, we explained the licensing and technological issues concerning that platform and the solution we have negotiated with PitchBook. You asked that we follow up with an email explaining our understanding as to what PitchBook is willing to permit. Based upon our discussions with PitchBook, it is our understanding that PitchBook is willing to set up a temporary trial account for SoundExchange with the same level of access to the database that Mr. Pakman had and to permit SoundExchange to evaluate the information Mr. Pakman reviewed. Because counsel for NAB and we have had the discussions and communications with PitchBook to date about this issue, however, we will undertake to initiate the initial discussion to introduce you to PitchBook and to permit you such access.

Second, as it concerns your Requests Nos. 26-29, I explained that we already have produced all of the materials relied upon – or otherwise reviewed or referred to – by Mr. Pakman in preparing his Written Direct Testimony (WDT). Production of such materials relied upon by an expert witness, such as Mr. Pakman, is consistent with the position SoundExchange itself has taken in this litigation. *See, e.g.*, SoundExchange Response to Request for Production No. 96. As I further explained, Mr. Pakman did not rely upon, or

otherwise review or reference, other materials that SoundExchange is now separately seeking from Venrock. Mr. Pakman is not appearing as an employee of Venrock but rather in his own capacity as an expert witness with specialized background and experience in both webcasting and venture capital investment. The additional materials that SoundExchange has requested are not directly related to his testimony as an expert witness in this proceeding, nor is it proper to seek them from Venrock.

SoundExchange's attempt to obtain material from Venrock – as opposed to Mr. Pakman – is not only improper for the reasons I have stated previously, but also appears to be premised on mischaracterizations of Mr. Pakman's testimony. In both your November 14 letter and during the meet and confer, you indicated that you needed access to Venrock materials to investigate Mr. Pakman's alleged testimony as to the reasons why Venrock does not invest in internet radio or webcasting companies. But as I explained on the call, and as a quick review of Mr. Pakman's WDT plainly establishes, Mr. Pakman does not make any assertion as to why Venrock has not invested in such companies. Rather, Mr. Pakman states only that Venrock has not invested in webcasting companies, and separately states – in a different section of his testimony – that investment in webcasting on the whole is lower than expected due to high royalty rates. This testimony is plainly based on his own experience – *see, e.g.*, WDT at 5, Para. 16 (“In my experience...”); *id.* at 6 and Para. 19 (“I am not aware...” – and is not specific to any decisions by Venrock (or any other particular venture capital firm).

As I further explained, although Mr. Pakman did not rely on, or otherwise review or reference, any Venrock materials in offering his understanding, there are other materials that SoundExchange can review to investigate the types of companies in which Venrock has invested. Indeed, in addition to the publicly available listing of Venrock's current and alumni investments available on its website – which lists hundreds of such companies – it is also my understanding that the PitchBook database to which SoundExchange should soon have access will permit SoundExchange to research Venrock's (and other firms') investments; as such, any question about SoundExchange's ability to review Venrock's investments is premature, and any potential dispute is not ripe for the Copyright Royalty Judges' consideration. Further, as I also explained, in the spirit of compromise, we have already produced documents in Mr. Pakman's possession concerning potential investments in digital music services – including personal notes and emails to such companies – even though he did not rely on, review, or reference those documents in preparing his WDT. We believe that this approach is more than reasonable and adequate, and SoundExchange's request for burdensome and intrusive discovery into any other documents from Venrock is improper.

Regards,

Kevin

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From: Olasa, Kuruvilla [<mailto:Kuruvilla.Olasa@mto.com>]

Sent: Monday, November 17, 2014 4:54 PM

To: Miller, Kevin J.

Cc: 'Ablin, Karyn'; Lyons, Gregory; Joseph, Bruce; Leo, Evan T.; LeMoine, Melinda; Ehler, Rose

Subject: RE: Meet and Confer

Kevin,

Can we do 10:30 a.m. Pacific/ 1:30 p.m. Eastern. If that works, I will circulate a dial in and calendar invitation.

Best,

Kuru

From: Miller, Kevin J. [<mailto:kmiller@khhte.com>]

Sent: Monday, November 17, 2014 11:38 AM

To: Olasa, Kuruvilla

Cc: 'Ablin, Karyn'; Lyons, Gregory; Joseph, Bruce; Leo, Evan T.

Subject: Meet and Confer

Dear Kuru,

We are in receipt of your letter from Friday evening to Mark Hansen requesting a meet and confer concerning the production of additional materials from David Pakman. Unfortunately both law firms are not available today for a meet and confer concerning those materials, but could be available tomorrow any time from 1pm or later. Please let us know if there is a particular time tomorrow that works and, if so, whether you would like us to set up a conference bridge.

Regards,

Kevin Miller

Kevin J. Miller

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Exhibit B

RECEIVED

APR 27 2007

Copyright Royalty Board

Before the
COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
)
)

ADJUSTMENT OF RATES AND TERMS FOR)
PREEXISTING SUBSCRIPTION SERVICES)
AND SATELLITE DIGITAL AUDIO RADIO)
SERVICES)
)

Docket No. 2006-1 CRB DSTRA

**MOTION TO COMPEL SOUNDEXCHANGE TO PROVIDE INFORMATION
AND DOCUMENTS CONCERNING THE WRITTEN DIRECT TESTIMONY
OF SIMON RENSHAW, SUBMITTED BY SIRIUS SATELLITE
RADIO INC., XM SATELLITE RADIO INC. AND MUSIC CHOICE**

INTRODUCTION AND SUMMARY

Pursuant to 17 U.S.C. § 803(b)(6)(C)(v) and (vi) and 37 C.F.R. § 351.5(b) and (c), Sirius Satellite Radio Inc., XM Satellite Radio Inc., and Music Choice (collectively, "Movants") hereby request that the Copyright Royalty Judges ("Judges") compel SoundExchange to provide specific information and documents related to the written direct testimony of Simon Renshaw, President of Strategic Artist Management. Specifically, Movants seek an order compelling SoundExchange to provide:

1. Marketing plans for new album releases or artists created in 2005 and 2006 on behalf of Mr. Renshaw's clients;
2. Documents in Mr. Renshaw's or Strategic Artist Management's possession, custody, or control reflecting recording artists' opinions concerning the value of appearing on or receiving airplay on Movants' Services (as defined below);
3. Documents discussing or reflecting efforts made by Mr. Renshaw, Strategic Artist Management, record labels, independent promoters or Mr. Renshaw's clients to obtain airplay on Movants' Services, including airplay of sound

recordings and live in-studio performances, and reflecting the amount of money spent, actions taken, and correspondence sent to accomplish such efforts;

4. E-mails that were sent or copied to, or received by, Mr. Renshaw that mention Movants' Services, including the importance and role of Movants' Services, other digital services, and terrestrial radio in promoting new albums and artists; the current or other rate-setting proceedings; the promotional or substitutional impact of Movants' Services; the importance of digital revenues to an artist's success; strategies seeking promotion on Movants' Services; and any reason for the decline in record sales; and
5. Contracts or agreements between Strategic Artist Management and any of its clients that discuss or otherwise refer to Movants' Services.

As discussed in further detail below, the requested information relates directly to sworn statements made by Mr. Renshaw concerning the extent to which Movants' SDARS and PSS services (collectively, "Movants' Services") are promotional in nature and the extent to which Mr. Renshaw attempts to promote his clients' sound recordings through various media. Movants served several document requests on SoundExchange to obtain information that would enable them to test the credibility of these assertions and to ascertain whether Mr. Renshaw's actual conduct and statements correlate with what he is now telling the Judges. SoundExchange, however, has refused to produce the requested information.

Moreover, as explained below, Movants carefully have narrowed and targeted the types of documents and information that they seek to obtain through this motion, so as to balance the burden on SoundExchange against the materials' undisputed relevance to core claims made in SoundExchange's case. Accordingly, Movants respectfully request that the Judges grant this narrowly crafted motion.

Pursuant to 37 C.F.R. § 351.1(b)(1), the parties have conferred on this issue, including via a meet-and-confer conference call on April 16, 2007 and subsequent written correspondence, but have been unable to resolve the matter.

ARGUMENT

I. THE GOVERNING STANDARD AUTHORIZES DISCOVERY OF RELEVANT DOCUMENTS (A) THAT DIRECTLY RELATE TO SOUNDEXCHANGE'S CASE OR (B) WITHOUT WHICH THE JUDGES' RESOLUTION OF THIS PROCEEDING WOULD BE SUBSTANTIALLY IMPAIRED.

The discovery standard governing this proceeding authorizes a participant to request non-privileged documents that directly relate to the written direct statement of an opposing participant. *See* 17 U.S.C. § 803(b)(6)(C)(v); 37 C.F.R. § 351.5(b). The statute and regulations make clear that a party's written direct statement includes witness statements, exhibits, designated testimony from prior proceedings, and the party's rate proposal. *See* 17 U.S.C. § 803(b)(6)(ii)(II); 37 C.F.R. § 351.4 (b).

The statute also authorizes a participant to request of an opposing participant or witness other relevant information and materials – even if such information and materials may not directly relate to that participant's written direct statement. Either upon a written motion or a request on the record, the participant may seek any relevant information and materials upon a showing that “absent the discovery sought, the Copyright Royalty Judges’ resolution of the proceeding would be substantially impaired.” *See* 17 U.S.C. § 803(b)(6)(C)(vi); *see also* 37 C.F.R. § 351.5(c) (authorizing discovery where the Judges “determine that, absent the discovery sought, their ability to achieve a just resolution of the proceeding would be substantially impaired”). Relevant factors to the “substantial impairment” analysis include:

- I. “whether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues”;

2. "whether the requested information would be unreasonably cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome, or less expensive"; and
3. "whether the participant seeking discovery has had ample opportunity by discovery in the proceeding or by other means to obtain the information sought."

17 U.S.C. § 803(b)(6)(C)(vi)(I); *see also* 37 C.F.R. § 351.5(c).

II. THE REQUESTED DOCUMENTS WILL ALLOW MOVANTS TO ASSESS MR. RENSHAW'S CREDIBILITY.

A. SIMON RENSHAW TESTIFIED AT LENGTH REGARDING THE PROMOTIONAL ACTIVITIES OF HIS BUSINESS AND THE ROLE AND VALUE OF MOVANTS' SERVICES.

Mr. Renshaw is a manager of recording artists. As such, he states that his goal is to effectively drive sales of sound recordings and promote recording artists' careers. Renshaw WDT at 3.¹ He therefore describes the types of promotional activities he has undertaken for artists he represents. Renshaw WDT at 3-4. Specifically, Mr. Renshaw asserts that when a recording artist releases a new album, "the record label develops a promotional plan" and that part of his responsibilities as a manager is to "work with and supplement the strategies designed by the record label to promote sales of the album." Renshaw WDT at 3.

Mr. Renshaw also claims, in essence, that the satellite services have little promotional value to sales of his client's sound recordings. Renshaw WDT at 3; *see also* Renshaw WDT at 4-5 (asserting that "most of the executives" he has dealings with "believe that is more value to have an artist, album or song featured [on other digital outlets] than it is to have an artist's music played by the satellite radio services" and that "the value that recording artists provide to the

¹ Written direct testimony from a particular witness is cited herein by the witness's last name followed by the initials WDT - e.g., Renshaw WDT

satellite services outweighs the benefit that XM and Sirius offer to recording artists"). His testimony, however, is not entirely consistent. Mr. Renshaw admits that Movants provide various promotional opportunities to recording artists, noting that "satellite services can and do play in-studio concerts or live performances." Renshaw WDT at 5. In reference to these promotional events, Mr. Renshaw declares that "artists sometimes welcome these opportunities" Renshaw WDT at 5. Moreover, he is of the opinion that Movants' Services are "a friendly vehicle for artists" and "less constrained than terrestrial radio." Renshaw WDT at 4-5.

B. MOVANTS SOUGHT THE REQUESTED DOCUMENTS TO TEST THE VALIDITY OF THESE ASSERTIONS.

In order to assess the credibility of Mr. Renshaw's assertions, Movants sought documents underlying his claims regarding the promotional value of Movants' services through multiple targeted document requests. Specifically, Movants requested "each document directly related to Mr. Renshaw's assertions . . . that '[t]he value that recording artists provide to satellite services outweighs the benefits that XM and Sirius offer to recording artists' and that '[t]he value that [the satellite services] receive from music is greater than the value the artists receive from the services.'" Requests Related to Written Direct Testimony of Simon Renshaw 18 ("Renshaw Req."). Movants further requested "each document directly related to Mr. Renshaw's assertion on page 5 [of his declaration] that 'I have not yet seen a direct connection between artist involvement with the satellite services and increased sales.'" Renshaw Req. 33.

Additionally, Movants sought documents discussing or reflecting any efforts made by Mr. Renshaw and/or his agency to obtain airplay or promotion on Movants' Services.

Specifically, Movants sought:

Each document relating to, reflecting, or discussing the efforts by Mr. Renshaw, any record label, any independent promoter, or any of Mr. Renshaw's clients to obtain airplay of Mr. Renshaw's clients on XM, Sirius, Music Choice, or any other PSS, including airplay of sound recordings and live in-studio performances, and the amount of money spent on these activities from 2000 to present.

Renshaw Req. 4.

Each document relating to, reflecting, or discussing Strategic Artist Management's clients' appearances and/or airplay on satellite radio or PSS.

Renshaw Req. 5.

Additionally, to assess the validity of Mr. Renshaw's claims regarding the amount of promotion his clients seek on Movants' Services, Movants also sought production of the promotional plans Mr. Renshaw explicitly references in his testimony. See Renshaw Req. 19; *see also* Renshaw Req. 4, 5. While Movants initially sought all documentation relating to the development and creation of these plans (including the plans themselves), Movants conferred with SoundExchange and narrowed the request to only those promotional plans created in 2005 and 2006.

In addition, Movants requested that SoundExchange produce documentation regarding Mr. Renshaw's testimony relating to the sentiments of recording artists regarding promotional opportunities on Movants' Services. Specifically, Movants requested:

Each document directly related to Mr. Renshaw's assertion on page 5 that "[a]rtists sometimes welcome these opportunities, but perhaps more for aesthetic than economic reasons," including but not limited to each document relating to, reflecting, or discussing the instances in which each

of Mr. Renshaw's clients has sought out, accepted or declined such opportunities from 2000 to the present and the reasons underlying each such decision.

Renshaw Req. 32.

Furthermore, given the breadth of testimony offered by Mr. Renshaw regarding his clients and Movants' Services, Movants sought "each document relating to, reflecting, or discussing agreements, contracts, or other similar documents between Strategic Artist Management and its music artist clients that reference XM, Sirius, satellite radio, Music Choice, or any other PSS." Renshaw Req. 7.

C. DESPITE MOVANTS' MULTIPLE REQUESTS, SOUNDEXCHANGE FAILED TO PRODUCE THESE CRITICAL DOCUMENTS.

The information and documents sought relate directly to Mr. Renshaw's testimony. Yet, SoundExchange has supplied very little in response to Movants' requests. In fact, SoundExchange initially produced only seventeen (17) documents in response to Movants' requests related to Mr. Renshaw's testimony.

For example, SoundExchange has failed to produce all of the requested promotional plans. To date, SoundExchange has produced only three such plans. Given Mr. Renshaw's standing in the industry and his undoubted wealth of clientele, this response is grossly deficient. Indeed, Mr. Renshaw's client list indicates that Strategic Artist Management has at least ten clients, and he lists at least five such artists by name in his testimony. Even though Movants agreed to narrow the scope of their request to include only promotional plans created in 2005 and 2006, SoundExchange still has not produced any additional plans.

Similarly, SoundExchange has not produced any documents relating to recording artists' opinions of Movants' Services or efforts undertaken to obtain airplay on Movants' services. Nor

has SoundExchange produced a single agreement between Strategic Artist Management and any of its clients that reference Movants' Services. SoundExchange agreed to search for more documentation of this nature, but has yet to produce any additional documents or confirm that none exist.

The remainder of the documents produced by SoundExchange in response to Movants' requests related to Mr. Renshaw's testimony are duplicative e-mail communications reflecting broad promotional undertakings by Mr. Renshaw -- in generic and non-substantive form -- in connection with Movants' Services. Again, SoundExchange agreed to continue searching, but Movants have yet to receive any additional documentation.²

**D. MOVANTS ARE ENTITLED TO THE REQUESTED DOCUMENTS
BECAUSE EACH REQUESTED CATEGORY OF DOCUMENTS
PERTAIN TO SPECIFIC STATEMENTS MADE WITHIN MR.
RENSHAW'S TESTIMONY.**

Movants filed targeted requests to assess the validity of the various claims made by Mr. Renshaw in his written direct testimony about the promotional value of Movants' Services. See *supra* II.A. The documents sought will allow both Movants and the Judges to analyze Mr. Renshaw's credibility, as well as whether his broad assertions correlate to the actual promotional activities in which he engages on behalf of his clients.

1. Movants Request Promotional Plans for Mr. Renshaw's Clients.

In order to assess the validity of Mr. Renshaw's declarations regarding the promotional plans created for his clients, as well as the types of strategic decisions discussed within them,

² It is important to note that the SoundExchange production contained almost no e-mail communications for Mr. Renshaw. It defies logic that in today's world of modern communications, Mr. Renshaw does not use e-mail to communicate with his clients and their respective record label representatives. Although SoundExchange agreed to search for additional e-mail communications, no additional documents have been received to date.

Movants seek a limited subset of these materials. These plans will shed light upon the inner workings of Strategic Artist Management, as well as the importance placed upon Movants' Services within the promotional process. Mr. Renshaw not only offered testimony about the existence of these critical plans, but he offered his insights regarding the value and role of Movants' Services as part of these promotional activities. Movants seek these plans as a mechanism to ensure that Mr. Renshaw's words are consistent with the actions he has taken on behalf of his clients.

2. Movants Request Documents Concerning Recording Artists' Opinions Regarding the Promotional Value of Movants' Services.

In Mr. Renshaw's testimony, he declares that recording artists have expressed opinions regarding the promotional value of Movants' Services. Movants seek documents that would reflect these opinions. Certainly, the opinions of recording artists will shed light upon the true extent to which Mr. Renshaw employs the Movants' Services in his day-to-day operations. Additionally, Movants – and the Judges – must be able to assess the validity of Mr. Renshaw's blanket assertion about the opinions of recording artists. If there is no concrete evidence to support his bald claims, the Judges will need to consider that fact in determining what weight, if any, they should afford Mr. Renshaw's testimony.

3. Movants Request Documents Concerning the Promotional Activities of Strategic Artist Management as They Relate to Movants' Services.

In response to numerous allegations by Mr. Renshaw regarding the limited promotional value of Movants' Services, Movants seek documents sufficient to highlight the promotional activities Mr. Renshaw and Strategic Artist Management engage in on behalf of recording artists. Specifically, Movants seek these documents to analyze the extent to which Mr. Renshaw utilizes

Movants' Services for marketing and promoting his clients. Such documents will allow the Movants to assess the importance of Movants' Services to Mr. Renshaw and whether the sweeping declarations in his testimony align with the actual promotional strategies he implements on behalf of his clients.

4. Movants Request E-mails Sent or Copied to, or Received By, Mr. Renshaw Concerning the Promotional Value of the Movants' Services, the Role Movants' Services Play in Promotional Activities, and the Decline in Record Sales.

Movants sought e-mail communications relating to Mr. Renshaw's testimony pertaining to Movants' Services and the decline in record sales. Such communications would shed further light upon the internal and external business and promotional strategies undertaken by Mr. Renshaw. The few e-mails produced by SoundExchange evidence certain promotional undertakings by Mr. Renshaw in connection with Movants' Services— albeit in generic and non-substantive form. Movants' sought the more specific communications that no doubt exist to shed light upon the veracity of Mr. Renshaw's testimony. In sum, Movants seek additional e-mail communications sent or copied to, or received by, Mr. Renshaw that relate to the promotional value of the Movants' Services, the role Movants' Services play in promotional activities, or the decline in record sales.

5. Movants Request Agreements Between Strategic Artist Management and Its Clients That Specifically Reference Movants' Services.

Finally, in response to Mr. Renshaw's testimony regarding the promotional activities he undertakes on his clients' behalf, Movants seek all agreements and contracts between Strategic Artist Management and its clients that reference Movants' Services. Fundamental to an assessment of Mr. Renshaw's credibility are the very agreements he enters while promoting his

clients. These agreements, to the extent they mention Movants' Services, will enhance the Movants' ability to highlight whether Mr. Renshaw's actions are consistent with the written testimony he submitted in this proceeding.

III. THE DOCUMENTS ARE HIGHLY RELEVANT TO THIS PROCEEDING AND WITHOUT PRODUCTION OF THE REQUESTED DOCUMENTS, THE JUDGES' ABILITY TO RESOLVE THIS PROCEEDING WOULD BE SUBSTANTIALLY IMPAIRED.

As explained in detail above, Movants' document requests sought various specific types of documents underlying the factual assertions in the written direct testimony of Mr. Renshaw, including, but not limited to, his statements regarding both the promotional value of Movants' Services and the role Movants' Services play in the promotional activities undertaken by Strategic Artist Management on behalf of its clients. Additionally, the documents requested would allow Movants to scrutinize the claimed lack of promotional value of their Services in light of the everyday promotional strategies employed by Mr. Renshaw. As such, these documents fall squarely within the bounds of permissible discovery.

Further, all of the documents Movants seek are critical to an evaluation of the validity of Mr. Renshaw's testimony. The Judges' are entitled to a complete set of documents upon which they can assess the validity of Mr. Renshaw's assertions. At present, SoundExchange has only proffered 53 documents of limited value in response to Movants' requests to Mr. Renshaw. A more robust production – in line with what Movants' have requested – is necessary to allow Movants to provide the Judges' with a fuller understanding of the promotional value of Movants' Services, which SoundExchange has placed at issue in this proceeding.

Further, the requests have been narrowly tailored to minimize the burden on SoundExchange. Ultimately, the documents Movants seek will be located either within Mr.

Renshaw's or Strategic Artist Management's custody and control. Given that SoundExchange only produced 53 documents relating to Mr. Renshaw's testimony – an absurdly small number by any standard – it should be compelled to respond to the Movants' narrow and targeted document requests referenced herein.

IV. THE REQUESTED INFORMATION IS NOT READILY AVAILABLE TO THE MOVANTS IN A FORM LESS BURDENSOME FOR SOUNDEXCHANGE TO PRODUCE.

The documents are uniquely in the possession of Mr. Renshaw and Strategic Artist Management and are not available to Movants in any other form. Because such documents are accessible to Movants only through the discovery process, Movants will have no other means to review these documents unless SoundExchange is compelled to produce them. Further, as SoundExchange's production in response to the above-cited document requests has been extremely sparse, the requested documents certainly would not be cumulative or duplicative of other materials produced in this proceeding. Accordingly, the most convenient and least burdensome way to obtain these relevant documents is through SoundExchange, Strategic Artist Management, and Mr. Renshaw himself.


CONCLUSION

In sum, SoundExchange has refused to produce the documents that Movants have requested in order to substantiate and test Mr. Renshaw's broad claims regarding the promotional value of Movants' Services, the role Movants' Services play in promotional undertakings for artists under his management, and the overall promotional processes employed by Strategic Artist Management. The requested documents will enable Movants to assess the validity of Mr.

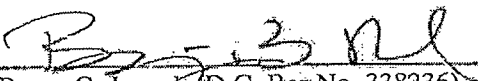
Renshaw's assertions, and because these documents may directly refute SoundExchange's arguments in this proceeding, the Judges' resolution of this rate-setting proceeding would be substantially impaired absent the opportunity to review the requested information.

Accordingly, Movants respectfully request that the Board order SoundExchange to conduct a reasonable search with respect to Mr. Renshaw's written direct testimony and produce the documents referenced and requested above.

Respectfully submitted,


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Counsel for Music Choice

April 27, 2007

ATTACHMENT A

Pertinent Excerpts From Requests To SoundExchange For Production Of Documents
Regarding The Testimony of Simon Renshaw, Submitted By Sirius Satellite Radio Inc.,
XM Satellite Radio Inc... And Music Choice

Requests Related to Witness Statement of Simon Renshaw

4. Each document relating to, reflecting, or discussing the efforts of Mr. Renshaw, any record label, any independent promoter, or any of Mr. Renshaw's clients to obtain airplay of Mr. Renshaw's clients on XM, Sirius, Music Choice or any other PSS, including airplay of sound recordings and live in-studio performances, and the amount of money spent on each of these activities from 2000 to the present.

RESPONSE: SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request to the extent it is oppressive, harassing, overbroad and/or unduly burdensome. SoundExchange objects to this request to the extent it is ambiguous and vague. SoundExchange objects to this request to the extent it requires the creation of documents. Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents, if any, directly related to its written direct statement that are located after a reasonable search.

5. Each document relating to, reflecting, or discussing Strategic Artist Management's clients' appearances and/or airplay on satellite radio or PSS.

RESPONSE: SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request to the extent it is oppressive, harassing, overbroad and/or unduly burdensome. SoundExchange objects to this request to the extent it is ambiguous and vague. SoundExchange objects to this request to the extent it calls for documents that are already in your possession. Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents, if any, directly related to its written direct statement that are located after a reasonable search.

7. Each document relating to, reflecting, or discussing agreements, contracts or other similar documents between Strategic Artist Management and its music artist clients that reference XM, Sirius, satellite radio, Music Choice, or any other PSS.

RESPONSE: SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request to the extent it is oppressive, harassing, overbroad and/or unduly burdensome. SoundExchange objects to this request to the extent it is ambiguous and vague. Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents, if any, directly related to its written direct statement that are located after a reasonable search.

18. Each document directly related to Mr. Renshaw's assertions on pages 3 and 5 that "[t]he value that recording artists provide to the satellite services outweighs the benefit that XM and Sirius offer to recording artists" and that "[t]he value that [the satellite music services] receive from music is greater than the value the artists receive from the services."

RESPONSE: Mr. Renshaw relied on his general knowledge and experience, including his current position as President of Strategic Artist Management, where he manages some of the world's most successful artists, and over twenty years working as a full-time manager of musical artists. Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents, if any, directly related to its written direct statement that are located after a reasonable search.

19. Each document directly related to Mr. Renshaw's assertion on page 3 that "[w]hen one of my clients releases a new album, the record label develops a promotional plan, and a major part of my responsibilities as a manager is to work with and supplement the strategies designed by the record label to promote sales of the album," including but not limited to each document relating to, reflecting, or discussing such plans (including plans involving satellite radio), their development, or the ways in which Mr. Renshaw carries out such plans.

RESPONSE: SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request to the extent it is oppressive, harassing, overbroad and/or unduly burdensome. SoundExchange objects to this request to the extent it is ambiguous and vague. Mr. Renshaw relied on his general knowledge and experience, including his current position as President of Strategic Artist Management, where he manages some of the world's most successful artists, and over twenty years working as a full-time manager of musical artists. Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents, if any, directly related to its written direct statement that are located after a reasonable search.

32. Each document directly related to Mr. Renshaw's assertion on page 5 that "[s]atellite radio services are a friendly vehicle for artists," including each document relating to, reflecting, or discussing each benefit to artists that is offered or provided by satellite radio.

RESPONSE: SoundExchange objects to this request to the extent it seeks documents not "directly related" to SoundExchange's written direct statement. SoundExchange objects to this request to the extent it is oppressive, harassing, overbroad and/or unduly burdensome. Mr. Renshaw relied on his general knowledge and experience, including his current position as President of Strategic Artist Management, where he manages some of the world's most successful artists, and over twenty years working as a full-time manager of musical artists. Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents, if any, directly related to its written direct statement that are located after a reasonable search.

33. Each document directly related to Mr. Renshaw's assertion on page 5 that "I have not yet seen a direct connection between artist involvement with the satellite services and increased sales."

RESPONSE: Mr. Renshaw relied on his general knowledge and experience, including his current position as President of Strategic Artist Management, where he manages some of the world's most successful artists, and over twenty years working as a full-time manager of musical artists. Without waiver of and subject to SoundExchange's general and specific objections, SoundExchange will produce responsive, non-privileged documents, if any, directly related to its written direct statement that are located after a reasonable search.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing JOINT MOTION TO COMPEL SOUNDEXCHANGE TO PROVIDE INFORMATION AND DOCUMENTS CONCERNING THE WRITTEN DIRECT TESTIMONY OF SIMON RENSHAW, SUBMITTED BY SIRIUS SATELLITE RADIO INC., XM SATELLITE RADIO INC. AND MUSIC CHOICE, INC. was served on April 27, 2007 via overnight mail on the following party:

Michael DeSanctis
Jenner & Block LLP
601 Thirteenth Street, NW,
Suite 1200 South
Washington, DC 20005
mdesantis@jenner.com

Counsel for SoundExchange, Inc.

A handwritten signature in black ink, appearing to read "Michael DeSanctis", written over a horizontal line.



Exhibit C

From: Ehler, Rose [mailto:Rose.Ehler@mto.com]
Sent: Wednesday, November 26, 2014 2:31 PM
To: Larson, Todd; Choudhury, Anjan; LeMoine, Melinda
Cc: Paul M. Fakler; Jackson Toof; bjoeph@wileyrein.com; Perelman, Sabrina; Jacob Ebin; Rich, Bruce; kabl@wileyrein.com; Thorne, John; Leo, Evan T.; msturm@wileyrein.com; Mark Pacella; Chris Mills; Klaus, Kelly; Pomerantz, Glenn; Olasa, Kuruvilla
Subject: RE: License agreements

Todd,

Thank you for your proposal. We believe this request would pose an undue burden, especially as none of SoundExchange's experts reviewed negotiating documents to support its economic assessment of the case and several of the services for which you're seeking documents are not benchmarks in SoundExchange's direct case. We therefore think much of what you are requesting is not "directly related" to SoundExchange's written direct testimony. We further object to the production of internal negotiating documents as far too burdensome given the substantial volume of this request and the time and expense of conducting a privilege review. We also object to collecting additional negotiating documents, beyond those already produced, from Beggars Group and Secretly Group as both are independent record labels with limited resources and extensive discovery burdens would discourage them and similar independent labels from agreeing to participate in the CRB proceedings.

Of course, as discussed in our call, we are amenable to compromise. We'd like to offer to collect, review and produce external negotiating documents from the majors related to the following five services:

Beats
Nokia MixRadio
Rdio
Slacker
Spotify

Please let us know if you agree.

Thanks,
Rose

Rose Leda Ehler | Munger, Tolles & Olson LLP
560 Mission Street | San Francisco, CA 94105
Tel: 415.512.4071 | Rose.Ehler@mto.com | www.mto.com

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-----Original Message-----

From: Larson, Todd [<mailto:Todd.Larson@weil.com>]

Sent: Tuesday, November 25, 2014 3:35 PM

To: Ehler, Rose; Choudhury, Anjan; LeMoine, Melinda

Cc: Paul M. Fakler; Jackson Toof; bjoseph@wileyrein.com; Perelman, Sabrina; Jacob Ebin; Rich, Bruce; kablin@wileyrein.com; jthorne@khhte.com; Evan T. Leo; msturm@wileyrein.com; Mark Pacella; Chris Mills

Subject: License agreements

Rose,

I'm writing to follow up on our call last week where we discussed SoundExchange's production of license agreements, reports of use, and negotiating documents related to license agreements between record companies and digital music services. On that call, we offered to propose a narrower set of agreements as to which we would request negotiating documents for your consideration. Accordingly, please let us know promptly whether SoundExchange would agree to produce negotiating documents related to agreements between the major record companies (and Beggars Group and Secretly Group to the extent they exist) and the following services:

Beats
iTunes Radio (incl. iMatch/iCloud)
MySpace
Nokia MixRadio
Rdio
Slacker
Spotify
Turntable.fm
Vevo
YouTube

To the extent not covered in the list above, we would also seek negotiating documents related to any services Mr. Harrison is referring to in his discussion of negotiations at paragraphs 19, 20, and 23 of his testimony. Finally, to be clear, our request includes not just documents that pass between the negotiating parties, but also documents internal to the record companies (e.g., deliberations, analyses, and other discussions related to the negotiations).

This request is made on behalf of Pandora, Sirius XM, and NAB.

Thank You.

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